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In The
Supreme Court of The United States
October Term 1998

SADANAND SINGH, et al.
*Petitioners,*

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.
*Respondents.*

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Second Circuit

# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. When the United States Supreme Court issues an opinion but does not address retroactivity because the parties waived any such argument, has the Court "reserved the question" of whether the decision applies to the parties before it so as to preclude retroactive application of the Court's decision?

2. What causation standard applies in fraud-based "willful misconduct" cases under the Warsaw Convention?

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## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

## TREATIES AND SPECIAL CONTRACTS INVOLVED

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, TS No. 876 (1934), *reprinted in*, 49 U.S.C.A. § 40105 (1997) ("The Warsaw Convention")

Art. 22(1) of the Warsaw Convention states:

> In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

IATA Intercarrier Agreement on Passenger Liability ("IIA")

Paragraph 1 of the IIA states:

> [The undersigned carriers agree] [t]o take action to waive the limitation of liability of

recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.

Paragraph 8 of the IIA states:

> [The undersigned carriers agree] [t]hat any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Agreement on Measures to Implement The IATA Intercarrier Agreement ("MIA")

Paragraph I(1) of the MIA states:

> {Carrier} shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.

Paragraph V(2) of the MIA states:

> Any carrier Party hereto may withdraw from this Agreement by giving twelve (12) months'

written notice of withdrawal to the Director General of IATA and to the other carriers Parties to the Agreement.

## I. THE IATA INTERCARRIER AGREEMENT IS A SPECIAL CONTRACT WHICH AFFECTS ONLY SIGNATORY AIR CARRIERS AND THEREFORE DOES NOT SUPERSEDE THE WARSAW CONVENTION'S LIABILITY LIMITATION FOR INJURY CAUSED BY NON-WILLFUL MISCONDUCT.

Article 22 of the Warsaw Convention authorizes air carriers to execute special contracts to increase their potential liability over the Warsaw Convention's original cap on monetary damages for injury or death arising from the non-willful misconduct of an air carrier. Article 22 has been the impetus for several contractual changes to the Warsaw Convention, most notably, the 1966 Montreal Agreement in which the official liability limit was raised to $75,000.

In the late 1990's, the International Air Transport Association ("IATA") drafted two special contracts, the IATA Intercarrier Agreement on Passenger Liability ("IIA") and the Agreement on Measures to Implement the IATA Intercarrier Agreement ("MIA"). Thomas Whalen, *Update on the IATA Intercarrier Agreement*, 13-Fall *Air & Space Lawyer* 1 (1998). Only air carriers which sign these contracts waive all liability limits for passenger injury and death. IIA, ¶ 1; MIA,

¶ I(1).[1]

Pan Am erroneously contends that the IIA and MIA render the Singh plaintiffs' arguments on a causation standard for "willful misconduct" irrelevant because proof of willful misconduct is no longer necessary to recover damages in excess of the $75,000 cap.[2] *See* Pan Am's Opposition Brief to Petition for Certiorari ("Opp. Brief"), p. 14. Pan Am's argument is incorrect.

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[1] The IIA opened for carrier signature in October 1995, whereas the MIA opened for signature in May 1996. Whalen, *supra*, at notes 15, 16.

[2] At one point, Pan Am contends the Singh plaintiffs' argument is moot. Opposition Brief, p. 14. Under *Murphy v. Hunt*, 455 U.S. 478, 102 S. Ct. 1181, 71 L.Ed.2d 353, "a case becomes moot when issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* at 481. Here, the causation standard for fraud-based willful misconduct is "live" because the hijacking occurred in 1986, well before the IIA and MIA were introduced. Thus, the Singh plaintiffs' recovery is limited unless they can prove "willful misconduct." Accordingly, the Singh plaintiffs' arguments are neither moot nor irrelevant.

## II. THE SINGH PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE CAUSATION STANDARD FOR FRAUD-BASED WILLFUL MISCONDUCT IS AN ISSUE OF IMPORTANCE DESPITE THE IATA INTERCARRIER AGREEMENT.

Pan Am's argument that the Singh plaintiffs' Petition for Certiorari should be denied because a "willful misconduct analysis" is no longer required under the IIA and MIA is based on two faulty premises: that all airline carriers have signed the IIA and MIA and that the carriers are irrevocably bound by the contracts.

In fact, not all airline carriers have signed the IIA or the MIA. Whalen, *supra*, at *19. Presumably, this is because the airlines are unwilling to expose themselves to unlimited liability for passenger injury or death. Moreover, even if a carrier signed the IIA and MIA, it may withdraw from the contracts and thus not be subject to unlimited liability:

> Any carrier Party may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers Parties to the Agreement.

IIA, ¶ 8; MIA ¶ (V)(2).[3]

If a carrier is not a party to the IIA and the MIA (because it did not sign the contracts or it withdrew from them), the carrier's liability is governed by the Warsaw Convention. Thus, the carrier may still take advantage of the cap on damages. Because of this,

> dual liability regimes will likely exist for the United States in the foreseeable future: a regime for those carriers that implemented the 1996 IATA Intercarrier Agreement and a regime for those carriers that chose not to implement the IATA Intercarrier Agreement, in which case liability will be governed by the Warsaw Convention as supplemented by the 1966 Montreal Agreement (a limit of $75,000 unless willful misconduct is proved)."

Whalen, *supra*, at *19.

Accordingly, parties suing for an injury sustained in an international aviation accident will still be required to argue the airline carrier engaged in willful misconduct if they are to recover damages in excess of the Warsaw Convention

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[3] Even if an air carrier signed the IIA or MIA, it may still argue it is not bound by it. Rubin, *The Warsaw Convention: Capping the Value of Life?*, 12 *Temp. Int'l & Comp. L.J.* 189, 234 (1998). If the contract is void, the Warsaw Convention's cap on damages would apply thus making a willful misconduct analysis necessary.

cap. It follows that the causation standard for willful misconduct remains a relevant and important issue in the field of international aviation injury claims.

## CONCLUSION

For the foregoing reasons, the Singh plaintiffs respectfully request this Court grant a Writ of Certiorari so as to correct the conflict of law between the Second Circuit and the United States Supreme Court, and to decide an important federal question, that has not been, but should be, settled by the court.

Dated: January 28, 1999

Respectfully Submitted,

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